RECEIVED
FILED
MAR 2 2 1984
CLERK

No. 83-824

In the Supreme Court of the United States

OCTOBER TERM, 1983

PATMON, YOUNG AND KIRK PROFESSIONAL CORPORATION AND FREDERICK PATMON, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Childs v. *Kaplan*, 467 F.2d 628 3

First Federal Savings & Loan Ass'n v. *Fisher*, 544 F.2d 902 3

Horton v. *State Street Bank & Trust Co.*, 590 F.2d 403 4

McCall v. *Cudd*, 544 F.2d 934 4

Rouse Construction International, Inc. v. *Rouse Construction Co.*, 680 F.2d 743 3

United States v. *Fabric Garment Co.*, 383 F.2d 984 3

United States v. *First National Bank*, 576 F.2d 852 4

Statutes and rule:

Internal Revenue Code of 1954, 26 U.S.C. 7602 1

28 U.S.C. 1291 ..... 3, 4

Fed. R. Civ. P. 69(a) 1, 2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-824

PATMON, YOUNG AND KIRK PROFESSIONAL CORPORATION AND FREDERICK PATMON, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the court of appeals' holding that it lacked jurisdiction of their interlocutory appeals from a district court order directing them to appear before a magistrate for the conduct of a debtor's examination under Fed. R. Civ. P. 69(a).

1. Petitioner Patmon, Young and Kirk is a professional corporation engaged in the practice of law. In aid of an investigation of the tax liabilities of Hallison Young, one of the corporation's principals, the IRS issued summonses, under authority of Section 7602 of the Internal Revenue Code (26 U.S.C.), for specified corporate financial records (Pet. App. 1a-2a). When the corporation refused to comply, the government petitioned for enforcement in the United States District Court for the Eastern District of Michigan

(*id.* at 5a). The district court ordered the summonses enforced, and the court of appeals denied a stay. The corporation nevertheless persisted in refusing to comply with the summonses, whereupon it was held in contempt (*id.* at 2a-3a). The corporation was fined $500 per day, or a total of $8,000, for its intransigence (*id.* at 3a, 5a).

The corporation refused to pay the fine (Pet. App. 5a). Pursuant to Fed. R. Civ. P. 69(a), the government sought discovery, in the form of testimony from the corporation's officers, as to the existence of assets from which the fine might be satisfied.[1] On April 20, 1983, the district court ordered the corporation to appear before a United States magistrate "for the taking of deposition[s] * * * concerning * * * the identity and location of [its] assets" (Pet. App. 8a-9a). The district court also referred to the magistrate, for report and recommendation, the government's requests for immediate payment of the $8,000 fine "as well as [for] more coercive sanctions such as the appointment of a receiver" (*id.* at 9a-10a).

The magistrate conducted a hearing and concluded that the witness furnished by the corporation "was not sufficiently informed to comply with the inquiry ordered" by the district court (Pet. App. 13a). On May 5, 1983, the magistrate ordered petitioner Patmon, the corporation's senior attorney, to appear and give testimony (*id.* at 13a-14a). Both Patmon and the corporation refused to appear before the magistrate (*id.* at 15a-17a). Instead, they filed a notice of appeal from the district court's April 20 order and the magistrate's May 5 order (*id.* at 28a-29a). The Sixth Circuit,

---

[1] Rule 69(a) provides that, "[i]n aid of [a] judgment or execution [for the payment of money], the judgment creditor * * * may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held."

in an unpublished order, "dismissed [the appeals] as non-appealable" (*id.* at 4a).[2]

2. The court of appeals correctly dismissed petitioners' challenge to the discovery orders for lack of jurisdiction. The jurisdiction of the courts of appeals is generally limited to appeals from "final decisions of the district courts." 28 U.S.C. 1291.[3] The district court's April 20 order, insofar as it instructed the corporation to appear before a magistrate "for the taking of depositions" (Pet. App. 8a), was an interlocutory order directing discovery, and the law is well established that such orders are not independently appealable "final decisions," but can be challenged only after a decision on the merits or by way of a contempt citation for refusal to comply. *E.g., Rouse Construction International, Inc.* v. *Rouse Construction Corp.*, 680 F.2d 743 (11th Cir. 1982); *Childs* v. *Kaplan*, 467 F.2d 628 (8th Cir. 1972); *United States* v. *Fabric Garment Co.*, 383 F.2d 984 (2d Cir. 1967).[4] The district court's April 20 order, insofar as it referred the question of additional sanctions to the magistrate "for

---

[2]The Sixth Circuit simultaneously disposed of 10 other appeals, filed by the corporation and by Hallison Young, seeking review of the district court's orders directing enforcement of the summonses, holding them in contempt, and imposing sanctions (Pet. App. 1a-4a). The corporation and Young have filed a separate petition for a writ of certiorari challenging the decision below insofar as it affirmed the district court in those respects. *Patmon, Young and Kirk Professional Corporation and Hallison H. Young* v. *United States*, No. 83-975.

[3]Petitioners' contention that their appeals could be sustained on the theory of "pendent and retained jurisdiction" (Pet. 25, 29; emphasis omitted) or under exceptions to the finality doctrine (*id.* at 30) was not raised below and must be deemed waived.

[4]Contrary to petitioners' contention (Pet. 28), the Fifth Circuit's per curiam decision in *First Federal Savings & Loan Ass'n* v. *Fisher*, 544 F.2d 902 (1977), is not in conflict with these holdings. The parties there did not address the jurisdictional issue, and the Fifth Circuit simply assumed that it had jurisdiction "[f]or the purposes of [that] case" (544 F.2d at 902 n.2).

report and recommendation" (Pet. App. 9a), was likewise interlocutory and plainly did not constitute a "final decision" within the meaning of Section 1291. And the May 5 order of the United States magistrate directing petitioner Patmon to appear for depositions, besides not being "final," was not even a "decision of a district court" for purposes of appeal under that Section. *Horton* v. *State Street Bank & Trust Co.*, 590 F.2d 403, 404 (1st Cir. 1979); *United States* v. *First National Bank*, 576 F.2d 852, 854 (10th Cir. 1978); *McCall* v. *Cudd*, 544 F.2d 934 (8th Cir. 1976).[5]

3. Petitioner Patmon contends (Pet. 32-37) that the orders entered below "are unlawful and void" as to him because the district court lacked jurisdiction of his person. Patmon, however, did not appeal from the district court's April 20 order — indeed, that order did not even apply to him — and he thus has no standing to challenge it. Patmon did appeal from the magistrate's May 5 order instructing him to appear for depositions, but, as we have pointed out above, that order was not appealable and his appeal was thus properly dismissed. Patmon has twice been directed by the magistrate to appear and give testimony, directions he has twice ignored. If he wishes to contest the magistrate's jurisdiction, his remedy is to take his claim to the district court, which has authority to accept, modify or reject the magistrate's recommendations. Until then, Patmon has suffered no injury and there is nothing for the court of appeals (or this Court) to review.

---

[5]Petitioners premise their jurisdictional arguments in part on the incorrect assertion that the orders in question "impos[ed] coercive sanctions" against them (Pet. 25-26). The orders here in question were issued solely in aid of discovery under Fed. R. Civ. P. 69(a). The orders imposing sanctions, which were separately appealed and which were affirmed by the Sixth Circuit, are the subject of a separate petition for a writ of certiorari. See page 3 note 2, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1984

DOJ-1984-03